



**Federal Communications Commission  
Washington, D.C. 20554**

June 11, 2012

**DA 12-912**  
**In Reply Refer to:**  
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**In re: KWKJ(FM), Windsor, MO**  
Facility I.D. No. 39629  
D&H Media, LLC  
File No. BPH-20081110AGK

**Petition for Reconsideration**

Gentlemen:

We have before us Patrick M. Sullivan's ("Sullivan") February 1, 2010, Petition for Reconsideration ("Petition") of the staff's December 31, 2009, action denying Sullivan's informal objection and granting the application (the "Application") of D&H Media, Inc. ("Licensee" or "D&H") for modification of facilities for Station KWKJ(FM), Windsor, Missouri (the "Station").<sup>1</sup> For the reasons set forth below, we deny the Petition.

*Background.* On March 19, 2001, the Supreme Court of the United States denied *certiorari* in the case of *Contemporary Media, Inc. v. FCC*.<sup>2</sup> This action rendered final the opinion of the United States Court of Appeals for the District of Columbia Circuit affirming the Commission's decision<sup>3</sup> revoking seven authorizations formerly licensed to entities affiliated with Michael Rice (the "Rice Stations"),<sup>4</sup> including KFMZ(FM), Columbia, Missouri, which was licensed to operate on Channel 252C2.

By Public Notice released July 3, 2001, the Media Bureau and the Wireless Telecommunications Bureau (collectively, the "Bureaus") gave notice of filing procedures for applications for interim and permanent authority to operate the stations, including KFMZ(FM).<sup>5</sup> The *Rice Public Notice* also

<sup>1</sup> *Letter to D&H Media, LLC*, Reference 1800B2 (MB Dec. 31, 2009) ("*Staff Decision*").

<sup>2</sup> 532 U.S. 920, 121 S.Ct. 1355 (2001).

<sup>3</sup> *Contemporary Media, Inc.*, 13 FCC Rcd 14,437 (1998).

<sup>4</sup> *Contemporary Media, Inc. v. FCC*, 214 F.3d 187 (D.C. Cir. 2000).

<sup>5</sup> *Permanent and Interim Authority Procedures Announced for Applications for Stations Formerly Licensed to Entities Controlled by Michael Rice*, Public Notice, 16 FCC Rcd 12832 (MMB/WTB 2001) ("*Rice Public Notice*").

announced that the now-vacant allotments for the Rice Stations would be included in FM Auction No. 37.<sup>6</sup> The *Rice Public Notice* states:

As explained in more detail below, in order to preserve broadcast service to the affected communities, the former licensees will be granted special temporary authorization to continue such operation for a period not to exceed 90 days from the date of this *Public Notice* or until 14 days after the interim operator or permanent successor licensee has given notice that it is ready to commence operations, whichever occurs sooner. Accordingly, minor change applications must continue to protect these formerly authorized facilities.<sup>7</sup>

On November 10, 2008, D&H submitted the Application proposing changes in the Station's effective radiated power, class,<sup>8</sup> and antenna height. However, the proposed Station upgrade was short-spaced to the now-vacant Channel 252C2 allotment at Columbia, Missouri (the "Columbia Allotment") at its specified reference coordinates.<sup>9</sup> In order to resolve this short-spacing, D&H proposed a change in these reference coordinates.<sup>10</sup>

On December 8, 2008, Sullivan, who indicated that he planned to bid at auction for the Columbia Allotment, filed an informal objection to the Application. Sullivan argued that the Columbia Allotment is not vacant and could not be changed or moved in order to accommodate an application as proposed by D&H. He cited the *Rice Public Notice* in which he claims the staff indicated that "any minor change application must continue to protect the formerly authorized facilities" of station KFMZ(FM).<sup>11</sup> Sullivan contended that a change in the Columbia Allotment reference coordinates as proposed by D&H would put any eventual licensee at a competitive disadvantage because of a loss in coverage to a significantly sized population in the nearby community of Jefferson City, Missouri.

In the *Staff Decision*, the staff rejected Sullivan's arguments, finding that the *Rice Public Notice* merely specified a temporary 90-day period for the protection of the formerly licensed Rice facilities and that the Columbia Allotment was, in fact, a vacant allotment. It therefore found that D&H was permitted to request the modification of the Columbia Allotment – as is the case with any vacant allotment –

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<sup>6</sup> A subsequent Public Notice included these stations in a listing of 500 vacant allotments for which NCE reservation showings could be filed. *Media Bureau Opens Window to Permit Noncommercial Educational Reservation Showings for Certain Vacant FM Allotments*, Public Notice, 18 FCC Rcd 19600 (MB 2003). In response to that Public Notice, the Curators of University of Missouri ("UM") filed an NCE reservation showing at the location of the former station KFMZ(FM) for Channel 252C2 at Columbia, Missouri. The showing, however, was returned for not meeting the new NCE reservation criteria, as adopted in the Reexamination of the Comparative Standards for Noncommercial Educational Applicants, Second Report & Order, 18 FCC Rcd 6691 (2003). UM sought reconsideration of this determination, which the Commission denied in December of 2003. *Reexamination of the Comparative Standards for Noncommercial Educational Applicants, Memorandum Opinion and Third Order on Reconsideration*, 23 FCC Rcd 17423, 17429-30 (2008). UM's Application for Review of that decision remains pending, and the Columbia, Missouri, allotment has not been set for auction.

<sup>7</sup> *Rice Public Notice*, 16 FCC Rcd at 12833.

<sup>8</sup> The Application proposed to change the Station's allotment from Channel 253C3 to 253C2.

<sup>9</sup> Prior to grant of D&H's proposal, the coordinates for the vacant allotment on Channel 252C2 at Columbia, MO were 38° 57' 21" NL, WL 92°16'24" WL.

<sup>10</sup> D&H proposed to re-locate the Columbia allotment to 39°-03'-06"NL, 92°-08'-26" WL.

<sup>11</sup> Formerly authorized Station KFMZ(FM) had been licensed at 38° 47' 28" NL, 92°17'43" WL.

provided that the modified coordinates complied with the spacing requirements in Section 73.207 of the Rules.<sup>12</sup> Accordingly, the staff denied the Sullivan informal objection and granted the Application.

In the Petition, Sullivan argues that the *Staff Decision* misreads the *Rice Public Notice* and “ignored” related facts and circumstances.<sup>13</sup> He argues that the language of the *Rice Public Notice* is unambiguous and that the requirement that “minor change applicants . . . continue to protect those formerly authorized facilities” is not limited to 90 days. He states that the Commission has protected each of the vacant allotments associated with the Rice Stations based on the coordinates specified in those now-revoked FM station licenses and contends that the Columbia Allotment should be treated in the same manner.<sup>14</sup> He therefore argues that we reconsider the *Staff Decision*, rescind the grant of the Application, and modify the reference coordinates of the Columbia Allotment to correspond to the coordinates specified in the revoked KFMZ(FM) license.

*Discussion.* The Commission will consider a Petition for Reconsideration only when petitioner shows either a material error in the Commission’s original order or raises changed circumstances or unknown additional facts not known or existing at the time of petitioner’s last opportunity to present such matters.<sup>15</sup> For the reasons set forth below, we conclude that Sullivan has not made such a showing and deny reconsideration on this basis.

Initially, we note that Sullivan does not seek reconsideration of the *Staff Decision*’s determination that the Columbia Allotment is a vacant allotment. We find unpersuasive his argument that the *Staff Decision* misreads the *Rice Public Notice* and therefore reject the claim that the Application should be dismissed because it fails to protect the revoked KFMZ(FM) license coordinates. Most importantly, the language in the *Rice Public Notice* states nothing about “reference coordinates.” We agree that all subsequently filed applications must protect the Columbia Allotment. However, as is the case with all vacant allotments, the Columbia Allotment is potentially subject to changes in reference coordinates to accommodate competing demands for FM spectrum, *provided that full protection is provided at the alternate coordinates and that operations from that site would otherwise fully comply with the Commission’s technical and service rules.*<sup>16</sup> The *Rice Public Notice* here at issue was merely designed to provide temporary protection for a then-operating Rice Station. We thus reject Sullivan’s alternate interpretation and related argument that the Bureaus established a fundamentally different protection scheme for the Columbia Allotment than the scheme that applies to all other vacant FM allotments.

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<sup>12</sup> 47 C.F.R. § 73.207.

<sup>13</sup> Sullivan also argues that the reference coordinates listed in the Commission’s data base for Channel 252C2 at Columbia, Missouri, were either inadvertently changed or erroneously entered. He indicates that “sometime in the recent past” the reference coordinates for the channel were “inexplicably or erroneously changed from 38° 47’ 28” NL, 92° 17’ 43” WL to 38° 57’ 21” NL, 92° 16’ 24” WL. Sullivan opines that these are actually the coordinates of Station KFMZ(AM) at a site that was dismantled more than 20 years previously following construction of Class C2 facilities. Sullivan thus claims that “the staff is unknowingly defending erroneous coordinates as the ‘original allotment coordinates.’” Petition at 7, 8 and Engineering Statement at 1-2. Sullivan’s point is irrelevant to the current proceeding.

<sup>14</sup> Petition at 6-7 and Engineering Statement at 3-4.

<sup>15</sup> See 47 C.F.R. § 1.106(c); *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff’d sum nom.*, *Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966); *National Association of Broadcasters*, Memorandum Opinion and Order, 18 FCC Rcd 24414, 24415 (2003).

<sup>16</sup> See, e.g., *Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services*, Report and Order, 21 FCC Rcd 14212, 14218 ¶ 9 (2006) (*Community Changes Order*) (“We will not count required reference coordinate changes (which are not set out in the Table of Allotments) against the current limit of four contingent minor modification applications that may be filed simultaneously.”)

*Conclusion/Actions.* For the reasons set forth above, the February 1, 2010, Petition for Reconsideration filed by Patrick M. Sullivan IS DENIED.

Sincerely,

Peter H. Doyle  
Chief, Audio Division  
Media Bureau

cc: D&H Media, LLC